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May 1, 1998

VIA HAND DELIVERY

Magalie Roman Salas
Secretary
Federal Communications Commission
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Washington, D.C. 20554

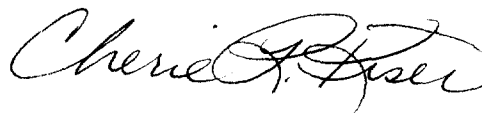
Re: Comments of Intermedia Communications Inc., CC Docket No. 98-39

Dear Ms. Salas:

On behalf of Intermedia Communications Inc. ("Intermedia"), enclosed for filing are an original and twelve copies of Intermedia's comments in support of the Petition of the Competitive Telecommunications Association, the Florida Competitive Carriers Association, and Southeastern Competitive Carriers Association in the above-referenced docket.

If you have any questions, please concerning this filing please contact the undersigned.
Thank you for your assistance.

Respectfully submitted,



Chérie R. Kiser

Enclosures

cc: Steven T. Brown
Donald Davis
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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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MAY 1 - 1998

FEDERAL COMMUNICATIONS COMMISSION
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Competitive Telecommunications Association,)	
Florida Competitive Carriers Association, and)	
Southeastern Competitive Carriers Association)	CC Docket No. 98-39
)	
Petition on Defining Certain Incumbent LEC Affiliates)	
As Successors, Assigns or Comparable Carriers Under)	
Section 251(h) of the Communications Act)	

COMMENTS OF INTERMEDIA COMMUNICATIONS INC.

Intermedia Communications Inc., ("Intermedia") by its undersigned counsel and pursuant to the Commission's Public Notice dated April 1, 1998,^{1/} hereby submits its comments in support of the Petition filed by the Competitive Telecommunications Association ("CompTel"), the Florida Competitive Carriers Association ("FCCA") and the Southeastern Competitive Carriers Association ("SECCA"). The Petition requests a declaratory ruling that an ILEC affiliate that:

(1) provides wireline local exchange or exchange access service within the ILEC's service area, and

(2) operates under the same or similar brand name,

shall be treated as a successor or assign under Section 251(h)(1)(B)(ii) and shall be subject to the obligations of ILECs under Section 251(c). In the alternative, the Petition requests that the

^{1/} Public Notice, Commission Seeks Comment on Petition Regarding Regulatory Treatment of Affiliates of ILECs, CC Docket No. 98-39, rel. April 1, 1998.

Commission propose a rule establishing a rebuttable presumption that an ILEC affiliate satisfying conditions (1) and (2) above is a "comparable" carrier under Section 251(h)(2), and therefore subject to the Section 251(c) interconnection obligations of ILECs. Intermedia supports this Petition, and seeks clarification that an ILEC cannot evade its Section 251 obligations by: (a) divesting itself of retail services and offering these services through an affiliate; (b) transferring customer-specific contract service arrangements ("CSAs") from the ILEC to an affiliate; or (c) transferring network elements to an affiliate. In all these cases, the ILEC affiliate should be deemed a successor or assign of the ILEC or a "comparable" carrier under Section 251(h) with respect to the transferred network elements, retail services, and CSAs.

INTRODUCTION

Intermedia is the largest independent competitive local exchange carrier ("CLEC") in the United States. It provides data, Internet, long distance, and local voice services, and has over 120 data and 20 local voice switches deployed throughout the country. Intermedia maintains one of the most sophisticated data networks in the country, with data switches and high capacity transport to provide advanced data services such as asynchronous transfer mode ("ATM"), frame relay, integrated services digital network ("ISDN"), and Internet access. Through its participation in the UniSPAN® consortium, Intermedia provides end-to-end frame relay service throughout the United States and Canada. Intermedia also provides frame relay service to five Central and South American countries. In July 1997, Intermedia acquired DIGEX, one of the country's largest internet service providers ("ISPs").

The implementation of the obligations of the Telecommunications Act of 1996 ("1996 Act") has played a major role in furthering Intermedia's success at bringing advanced innovative telecommunications services to consumers. As the nation's largest CLEC and a carrier that is

heavily reliant on data networks to provide both data and voice services, Intermedia is seriously concerned that ILECs will use the creation of affiliates to avoid their unbundling and wholesale resale obligations under Section 251, particularly with respect to CSAs, and new digital technologies and services. The benefits of competition currently being realized by consumers will be quickly eroded if ILECs can selectively avoid compliance with the Act through the establishment of affiliates.

DISCUSSION

The 1996 Act seeks, *inter alia*, to open bottlenecks and promote competition in the local telecommunications market. One of the avenues that Congress chose to achieve this goal is the imposition of resale obligations on ILECs.^{2/} Congress plainly did not intend to permit ILECs to avoid their resale obligations by simply transferring some or all of their retail services to an affiliate. If this were permissible, all ILECs would cease providing retail services overnight and have their affiliates offer these services instead. In fact, if Section 251 obligations did not apply to ILEC affiliates in such circumstances, and all ILECs had theoretically moved their retail services to affiliates the day after the 1996 Act came into effect, the resale requirement embodied in Section 251(c)(4) would have been rendered moot upon its enactment.

^{2/} ILECs are required:

- not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services;
- to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and
- to charge wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

47 U.S.C. §§ 251(b)(1), 251(c)(4)(A) & 252(d)(3).

Similarly, the Commission should not allow an ILEC to transfer CSAs that it has negotiated with end-users to an affiliate unless wholesale resale obligations are imposed on the ILEC affiliate. To permit otherwise would allow an ILEC to transfer all of its end-user contracts to its affiliate as soon as contracts are negotiated in order to avoid its obligation to offer these contracts at wholesale rates.^{3/}

Nor did Congress intend that ILECs could transfer network elements to an affiliate to evade unbundling obligations. Section 251 is designed to break the stranglehold that ILECs possess over local exchange and local access services and to promote competition by, among other things, requiring ILECs to provide unbundled network elements to requesting telecommunications carriers. Therefore, an ILEC cannot be allowed to avoid these unbundling requirements by simply transferring ownership of one or more network elements to an affiliate. This should hold true regardless of the type of service that the transferred network elements are used to provide. In particular, ILECs cannot be permitted to transfer new digital technologies in an effort to curtail the availability of essential elements critical to the continued rapid development and deployment of advanced service offerings.

^{3/} Application by BellSouth Corp. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Louisiana, Memorandum Opinion and Order, CC Docket 97-231, 1998 FCC LEXIS 552 at ¶65 (Feb. 4, 1998) ("We are unpersuaded by BellSouth's related claims that the wholesale discount should not be applied to contract service arrangements Because contract service arrangements are discounted retail service offerings that are not exempt from the statutory resale requirement in section 251(c)(4), we reiterate that BellSouth must offer contract service arrangements for resale at a wholesale discount to new entrants"). A wholesale transfer of customers by the ILEC to the affiliate would also be unfair to the ILEC's customers. Many of these CSAs may have been entered into prior to the existence of any truly competitive offerings. At a minimum, where an ILEC seeks to transfer CSAs to an affiliate the Commission should require the ILEC to give end users a "fresh look" opportunity to consider competitive offerings and, if desired, terminate their existing ILEC CSAs without liability. See DPUC Investigation of the Southern New England Tel. Co. Affiliate Matters Associates with the Implementation of Pub. Act 94-83 - Reopening, Decision, Docket No. 94-10-05 (Ct. DPUC Dec. 22, 1997).

Congress did not intend that its procompetitive, market-opening initiatives be neatly sidestepped through corporate maneuverings. This explains the existence of Section 251(h) in the Communications Act, as amended. This section treats successors or assigns of an ILEC as ILECs. In addition, it provides that the Commission may treat a LEC as an ILEC if certain conditions exist.^{4/}

An affiliate that offers ILEC retail services that the ILEC ceases to provide, and to which Congress intended wholesale resale requirements to apply, must be treated as a successor to, or assign of, the ILEC with respect to those retail services. Alternatively, the Commission should enact a rule establishing a rebuttable presumption that in such cases, the ILEC affiliate is a comparable carrier and therefore subject to Section 251 obligations. This approach should be taken regardless of the type of service that the ILEC seeks to migrate from itself to its affiliate – plain old telephone service or advanced digital service – until market conditions are truly competitive.^{5/}

This analysis applies equally to the divestment of network elements by an ILEC. If an ILEC transfers network elements to an affiliate, the Commission should deem the ILEC affiliate

^{4/} These conditions include, if:

- (a) the LEC occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by an ILEC;
- (b) the LEC has substantially replaced an ILEC; and
- (c) treatment of the LEC as an ILEC is consistent with the public interest, convenience, and necessity and the purposes of Section 251.

47 U.S.C. § 251(h).

^{5/} See Remarks by William Kennard, Chairman, FCC, to USTA's Inside Washington Telecom (April 27, 1998) (stating that new packet networks could be offered by an ILEC affiliate, free of unbundling and discounted resale requirements, when the competitive environment in which this service is offered is truly competitive).

a successor or assign of the ILEC with respect to those network elements and subject to 251(c) obligations. This was the conclusion reached by the Commission with respect to Bell operating company ("BOC") provision of interLATA services. The Commission stated that it would not allow a BOC to circumvent the nondiscrimination safeguards set forth in Section 272 by transferring local exchange and exchange access facilities and capabilities to an ILEC affiliate. In such cases, the Commission asserted that it would deem the ILEC affiliate to be an assign of the BOC with respect to those network elements. Any successor or assign of the BOC would then itself be subject to Section 272 requirements in the same manner as the BOC.^{6/}

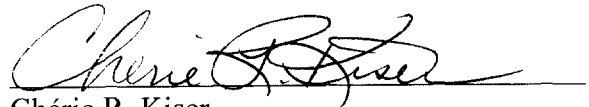
^{6/} Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 22054-55 at ¶¶ 309-311 (1996) ("Non-Accounting Safeguards Order"), on recon., 12 FCC Rcd 2297 (1997), recon. pending, petition for summary review in part denied and motion for voluntary remand granted sub nom., Bell Atlantic v. FCC, No. 97-1067 (D.C. Cir. filed Mar. 31, 1997), petition for review pending sub nom., SBC Communications v. FCC, No. 97-1118 (D.C. Cir. filed Mar. 6, 1997) (held in abeyance pursuant to court order filed May 7, 1997), on remand, 12 FCC Rcd 8653 (1997), order on remand aff'd sub nom. Bell Atlantic Telephone Cos. v. FCC, No. 97-1423 (D.C. Cir., Dec. 23, 1997); 47 CFR §53.207 (1998).

CONCLUSION

For the reasons discussed above, the Commission should treat the affiliate of an ILEC as an ILEC or comparable carrier, subject to Section 251 obligations, if the ILEC transfers one or more retail services, CSAs, or network elements to that affiliate.

Respectfully submitted,

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May 1, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have, this 1st day of May, 1998, served a copy of the foregoing by hand delivery to the following:

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